No. 457.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

OGLESBY GROCERY COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

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BRIEF FOR THE UNITED STATES.

The writ of error in this case seeks a review of the judgment of the District Court upon the verdict of a jury convicting the plaintiff in error of violating section 4 of the act of August 10, 1917 (40 Stat., c. 53, p. 276), known as the Food Control or Lever Act, as amended by section 2 of the act of October 22, 1919 (41 Stat., 1st sess., c. 80, p. 297), and imposing a fine of $2,000.

STATUTES INVOLVED.

The Food Control or Lever Act of August 10, 1917, recites that it was enacted, among other things, "to assure an adequate supply and equitable distribution" of certain enumerated necessaries, including food, and to "prevent, locally or generally, scarcity,

monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war."

Section 4 of the act provides that it shall be unlawful, among other things, for any person "to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries." The act, however, did not provide directly for a penalty for making unjust or unreasonable rates or charges. The means adopted for enforcing this part of the act were provided in section 5. That section authorized the President, when he should find it essential, to license those dealing in necessaries and to prescribe regulations for the issuance of such licenses. It was then provided that whenever the President shall find "that any storage charge, commission, profit, or practice of any licensee is unjust, or unreasonable * * *," he may revoke the license unless such condemned practice shall be discontinued; and that—

> The President may, in lieu of any such unjust, unreasonable, discriminatory, and unfair storage charge, commission, profit, or practice, find what is a just, reasonable, nondiscriminatory, and fair storage charge, commission, profit, or practice, and in any proceeding brought in any court such order of the President shall be prima facie evidence.

The criminal offense created by this section of the act is that one engaging in a business for which the presidential license is required, without obtaining

such a license, or after it has been revoked, shall be guilty of a criminal offense. For a considerable time, during actual hostilities and after the signing of the armistice, the President fixed the prices or the rate of profit which could be charged for many necessaries. Later, it was not deemed necessary to continue the elaborate licensing system and Congress, for the purpose of providing a method of enforcing the prohibition against unreasonable charges and rates, passed the act of October 22, 1919. Section 2 of that act amends section 4 of the act of August 10, 1917, and, in express terms, makes it a crime, punishable by fine or imprisonment, or both, "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

THE INDICTMENT.

The indictment, in each of four counts, charges the plaintiff in error with unlawfully and willfully making an unjust and unreasonable charge in handling and dealing in certain necessaries, to wit, in selling a certain quantity of granulated sugar to a specified person on the 13th day of April, 1920. The specific charge is that the plaintiff in error "did make a charge of twenty cents per pound therefor when and while seventeen and three-fourths cents per pound then and there was a just and reasonable charge for said sugar, and any charge in excess of seventeen and three-fourths (17¾) cents per pound therefor then and there was excessive, unjust, and unreasonable, the said Oglesby

Grocery Company, lately theretofore, having purchased the said sugar from the Savannah Sugar Refining Company at the price and charge of sixteen cents per pound on board cars at Savannah, Georgia, and the transportation charges thereon from Savannah to Atlanta then and there being twenty-six and nine-tenths (26.9) cents per hundred pounds." (Rec., pp. 1–3.)

PROCEEDINGS IN THE COURT BELOW.

The plaintiff in error, by demurrer, challenged the constitutionality of the act on which the indictment was based. This demurrer was overruled. (Rec., pp. 4–9.) The case was tried by the court and jury and resulted in a verdict of guilty on all four counts and a fine of $2,000. (Rec., p. 9.)

CONTENTIONS OF PLAINTIFF IN ERROR.

The plaintiff in error now raises the same objections to the constitutionality of the act in question that have been made in other cases which will be considered by the court simultaneously with this case.

In addition, it insists that, even if the act is constitutional, the judgment below is improper for various reasons set out in the assignments of error. These assignments relate to the action of the court in admitting and excluding evidence and in his instructions to the jury. Most of them are based on the contention that improper weight was given to the action of fair-price committees in fixing prices,

and the further contention that, in determining what is a reasonable rate or charge for necessaries sold at a given time, the test is whether the merchant has made an excessive charge over and above what it would have cost him at the time of the sale to replace the article sold, whereas the ruling of the court below made the test whether the price charged included an unreasonable excess over and above what the article sold had actually cost the merchant. In other words, the claim is that, while the sugar involved in this case had cost only something over 16 cents per pound, the market price of sugar in Atlanta had increased until, in order to have replaced the sugar sold, the plaintiff in error would have had to pay something like 25 cents per pound. It is therefore insisted that plaintiff in error has not made an unreasonable charge, unless he has charged an excessive amount over and above 25 cents.

ADMINISTRATIVE ACTION UNDER THE LEVER ACT.

The Lever Act of August 10, 1917, provided in section 1 that—

> The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act.

Section 2 of that act was as follows:

> That in carrying out the purposes of this act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to

> accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds.

Pursuant to these and other provisions of the act, the President availed himself of the services of persons throughout the country by creating what were called "fair-price committees," for the purpose of gathering the necessary data and determining what, under all the circumstances, would be fair and reasonable prices for necessaries. In addition, up to 1919, and during part of that year, a special control was maintained over the sale and distribution of sugar. Through proper agencies, the President acquired control of all available raw sugars. These were delivered to the refiners and, through them, to the wholesalers, the price to be charged by the refiner, the wholesaler, and the retailer being definitely fixed. Under this plan, as it existed in the summer of 1919, the wholesaler was allowed to charge for sugar 65 cents per 100 pounds above cost and freight. (Rec., p. 23.) When the Act of October 22, 1919, made the selling of necessaries at unreasonable prices a criminal offense, the operations of the fair-price committees were continued for the twofold purpose of furnishing the Attorney General with proper data upon which to determine what prices were so excessive as to require prosecutions, and for the further purpose of giving notice to merchants as to the prices beyond which

they could not go without subjecting themselves to prosecution. In the fall of 1919 the fair-price committee raised the profit of 65 cents theretofore allowed to $1 per 100 pounds. And plaintiff in error and other merchants had notice, at the time the sales now in question were made, that prices in excess of that would be regarded as unreasonable and subject the seller to prosecution. (Rec., p. 22.)

It is true that a short time after these sales the fair-price committee at Atlanta reached the conclusion that the allowed profit of $1 should be increased to $1.50, but the Attorney General did not concur in this conclusion and the action of the committee was, within a short time, rescinded. (Rec., p. 22.)

STATEMENT OF THE CASE AS PRESENTED TO THE JURY.

Plaintiff in error bought the sugar in question at a cost, including freight, of 16.269 cents per pound, and, very shortly thereafter, on April 13, 1920, sold it at 20 cents per pound. The charge which it thus made for handling and dealing in this sugar was 3.731 cents per pound, or nearly 23 per cent of invoice cost plus freight.

Prior to the passage of the act of October 22, 1919, the wholesalers were paying between 8 cents and 9 cents per pound for sugar and were allowed to charge 65 cents per 100 pounds above invoiced price and freight. (Rec., p. 23.) This price had been fixed as reasonable by the President through fair-price committees and other agencies. This was done during the time when the Government, by controlling raw

sugars, fixed the cost of sugar to the wholesaler at between 8 cents and 9 cents per pound. When the act of October 22, 1919, was passed, however, conditions had changed and the wholesaler was having to pay more for his sugar. Through the fair-price committees, then, the profit allowed was raised from 65 cents to $1, and this continued to be the rate allowed until after the sales involved in this case.

Prior to the war, and in normal times, it was the custom of wholesale merchants to handle sugar at a very narrow margin of profit. It was a staple which sold readily and with little expense, and hence was always handled at a small profit. Two witnesses, one testifying for the Government and one for the plaintiff in error, make substantially the same statements on this subject. and these statements are not controverted. The Government's witness says:

> The jobber handled sugar largely as the retailer did, largely as a matter of advertisement and accommodation to his customers. I can swear that it has not been the custom for a jobber or retailer ever to make anything that would be called a fair percentage of profit on sugar. The usual and customary profit in this market to a wholesaler selling sugar is dependent largely on the credit rating and the credit responsibility of or the prompt paying of the bills by the retailer what percentage of profit the jobber received. If it was on a cash sale from thirty-five cents a barrel of 350 pounds average to one dollar a barrel. The man who paid a dollar a barrel profit was not as careful on his buying; he wasn't as good buyer as the

man who could buy at thirty-five cents a barrel.

The margin of fluctuation for the wholesaler's profit ran from thirty-five cents to a dollar a barrel, but I don't want the jury to understand me to swear that no jobber ever charged higher profit than a dollar a barrel. I don't want to convey that impression. I would say that from thirty-five cents to a dollar dependent on the ability of the customer to buy on a close margin of profit to the wholesaler, as to whether it was nearer the lower price or nearer the higher price. And that time the invoiced price of sugar running to the wholesaler, I would say over a period of years, ran from four and and a half probably to six and a half cents per pound. (Rec., p. 23.)

The witness for plaintiff in error said:

In prewar times the price of sugar to the wholesaler ran from four and a half to seven or eight cents. It varied a good deal. And at that time we paid for the sugar on seven days after arrival. We handled sugar, in a very large measure, as a matter of accommodation to our customers. That was one consideration. It served as advertising, in a way. There was a profit in it, but not a large profit; the profit was smaller than on other things. The profit on a barrel of sugar, on a full round market it would run from 25 to 50 cents a hundred pounds. That would be about one-fourth of a cent per pound. There was not enough profit in it to handle it at that, to handle the sugar by itself and nothing else. (Rec. p. 46.)

Thus, these two witnesses agree that, in normal times, the wholesale merchant had been accustomed to get something like from 25 cents to 35 cents per 100 pounds profit on his sales of sugar.

There was evidence to the effect that, in normal times, it was the custom of merchants, when the price of sugar which they had bought advanced, to get, if they could, their usual profit over and above the market price at the time of selling, or at least to get the benefit of a part of this advance. These advances, however, were usually small, one witness saying—

> During the period before the war sugar did not fluctuate rapidly; ten points was usually about as much as sugar would change at a time, up or down. And that the fluctuations were usually seasonal; that is, when the crop first came in it would be lower, and would go up a little until the new crop came in, so the merchant buying sugar knew practically what he could get sugar for from time to time. (Rec., p. 34.)

Nor did the wholesaler always get the advantage of these advances. A witness for the plaintiff in error explains the situation thus:

> In this prewar condition, I think we paid from four and a half to seven and a half for sugar. The market varied. We followed the market if the market advanced; we got from a quarter to a half a cent a pound on it. Based on the invoice cost—invoice plus freight. That was the rule. It was always

> sold on a narrow margin. It was a staple article. The practice was if I bought at five cents to sell at five and a quarter or five and a half based on invoice plus freight on a steady market. The profit on sugar, except on an advancing market, rarely ever reached the percentage of cost of doing business. It was almost always under.
>
> If the situation was such that I could not advance with the market, for instance, I bought it at five cents and it went up to seven, and when I tried to sell at a profit over replacement value of seven cents I found that there was active competition here, offering at five and a half, less or more, less than seven, I could not get replacement and profit. I usually held the sugar until the fool sold his out and got my profit. I don't mean fool in an offensive sense, but a business man who does not, on a staple article like sugar, follow the market up is a fool business man. (Rec., p. 54.)

This witness was asked then as to the effect of this custom in the event of a very large advance in market price and gave some very interesting testimony, saying:

> If I bought sugar at sixteen cents and got in a carload and there wasn't but very little sugar in town, the sugar went up, I would believe in following the market. Reasonably so, but in the wholesale grocery buinesss, it is a man's trade that he is dependent on and I think the wise wholesale merchant usually tries to take care of his trade and doesn't try to hog them,

> but give them stuff they can sell all the time on the market, and I believe that if a man gets sugar in that cost him eighteen cents and the market was in a bad condition and it went up to twenty-nine or thirty, I believe that a wholesale merchant would be a pig if he charged his regular trade that much for it. * * * I think it is right for a man to take his advance, if it advances from nineteen cents to twenty-nine cents on a steady market on that, I think it is right, I think he is entitled to it, but you forget that I said a wholesale man had a certain line of trade that he has been selling probably for years, and he would only defeat his profit with them and would not want to take it. If a man had that opportunity to go from 18 to 29 cents and under practical competition here in the market and did not have a line of customers, and had that opportunity to make a great big profit, I think ninety-nine men out of every hundred would take it. I don't think that his conscience ought to restrain him, if he bought that building over there for two hundred and fifty thousand dollars, and sold it for a million—trades like that have been made all around town here. (Rec., p. 55.)

There was evidence tending to show that on April 13, 1920, wholesale dealers in Atlanta could not have bought sugar as low as 20 cents a pound.

What it actually cost for the wholesaler to handle sugar is well illustrated by the testimony of the witness James Lyons. This witness is connected with one of 51 wholesale grocery stores operated by one Creasy under the name of "Creasy Company."

These stores are operated somewhat on the cooperative plan, each retail merchant who desires to buy from the company pays in $300, and the aggregate of these payments is the capital on which the company does business. Creasy, as the head of the concern, receives for his services one-half of 1 per cent of all sales made. The plan is to sell to the merchants at actual cost—that is, the goods are sold at prices which yield a profit sufficient only to pay the expenses of running the stores and the one-half of 1 per cent which goes to Creasy. These stores are operated exactly as other wholesale grocery stores, except that no traveling salesmen are employed. The witness was employed to manage the Creasy store at Atlanta. He testified as follows:

> In my present business I have the usual expenses that other wholesalers have, in cost and interest; they have some expenses we do not. I have rent, employees, deliveries, interest, and I have men employed in my place of business, I think about twelve. There is expense that I do not have that other grocers do, they travel men and we do not. There is no other expense that I know of. My company pays no dividends in the ordinary sense. We pay Mr. Creasy one-half of one per cent on the volume of business done. The only expenses, the dividends and traveling men, that I do not have that the other grocers have. My business is conducted like any other grocer's business. I buy and sell. The margins of profits on the cost I allow to pay expenses outside of what I pay Mr. Creasy,

> runs different on different articles. We handle sugar and flour on a one per cent basis. Mr. Creasy gets one-half of one per cent and that leaves us one-half. I have one-half of one per cent on sugar and flour for the purpose of paying expenses of doing business. On other articles, three per cent. I do not get the three per cent where I don't handle the goods, but one per cent. I call goods I sell without handling, anything that is drop-shipped from the factory. That is where I don't take it out of the car, but pass it on to our customers. We do not have more than three per cent on anything. Our company has other stores elsewhere. They have been carrying on that sort of a business in the United States twelve years or more. They have never failed to make expenses on that, I think not. Out of the three per cent no one gets anything out of it except Mr. Creasy himself, and he gets one-half and the business gets the other two and a half per cent. (Rec., pp. 66-67.)

It will be seen that this business is conducted as other witnesses testify that the grocery business generally was conducted—that is, that sugar was an article on which the narrowest margin of profit was always charged. The testimony thus quoted shows that on sugar costing, including freight, $16.29 per 100 pounds, a profit of 1 per cent, or 16 cents, would pay its share of the expenses of conducting a grocery business in the ordinary way. If an advance of $1 per 100 pounds, or 1 cent a pound, be allowed as a reasonable rate, there would be left, as profit, 84 cents per 100 pounds.

On the trial of the case the Government introduced, as a witness, the fair-price commissioner. This man had been in the grocery business for many years. His testimony dealt with the different matters to be considered in determining reasonable prices, and explained the manner in which the fair-price committee had reached its conclusions. When he was asked to explain the methods of the fair-price committee, objection was interposed upon the ground that the fair-price committee had no legal function to perform and that the testimony was therefore immaterial. The objection was overruled, the court saying:

> The statute seems to give the witness an official position which qualifies him to reach a conclusion and that evidently ought to make his conclusions evidence—not conclusive evidence but as evidence in this case. (Rec., p. 21.)

The court, however, made it plain that the mere fact that the fair-price committee had fixed a price did not establish that a higher price would be unreasonable. Counsel insisted that if the prices so fixed were to be used against plaintiff in error, "we ought to have been charged with violating the prices fixed by the fair-price committee." But the court ruled:

> I don't think you could be. The fair-price commission could not make a crime, but they might make some evidence that would illustrate their story of a criminal case, but not

> make a crime. No order made without a full hearing should be conclusive, but I think it was within the power of the legislature to make it evidence although without any formal hearing, and I think in this case we have a situation in which there is a proceeding brought in this court and in which the orders of the President, made through this board, would be evidence. I think they are admissible. What effect the jury will give them in their decision of the case is a matter to be dealt with later. (Rec., pp. 20–21.)

And in the charge the jury was instructed that—

> The Government says that a just and reasonable rate had been fixed by the President through the agency of the Attorney General and also through the agency of the fair-price commission at Atlanta. Evidence has been introduced as to what these agencies of the President had determined to be a fair and just rate in handling sugar at wholesale. That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Co. was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as prima facie evidence as to what the Attorney General and the fair price commission decided was just and reasonable. (Rec., p. 76.)

BRIEF.

I.

Constitutional objections to the acts in question.

The questions raised in this case against the validity of the acts upon which the indictment is based are substantially the same as those urged in the cases of *United States* v. *Cohen Grocery Company*, No. 324; *Tedrow* v. *A. T. Lewis & Son Dry Goods Company*, No. 357, and *Kennington* v. *Palmer, Attorney General*, No. 367, which are to be heard and considered by the court simultaneously with this case. The Government's argument of these questions has been fully presented in the briefs filed in those cases and will not now be repeated. Those briefs, as well as the opinion of Judge Sibley in this case (Rec. pp. 4–8), are referred to and adopted as the answer to the brief filed in this case, and the present brief will be confined to a discussion of the questions arising on the trial, assuming the constitutionality of the act.

II.

This legislation treats the capital and energy employed during the war in the production and distribution of necessaries as employed in a business impressed with a public interest and seeks to regulate the charges for the services rendered.

The price which the consumer pays for any commodity includes the cost of production with the added charges of every agency or dealer handling it after its production and before it reaches the consumer. These include such items as transportation, storage,

brokerage, and the profits of jobbers, wholesalers, and retailers. Together, they embrace the charges for all the services rendered, either by labor or capital, in bringing the article to the consumer. Since they relate to the production and distribution of those things which are necessary to life itself, they affect in a very real sense the public interest. Ordinarily, they may safely be left to be controlled, through competition, by the law of supply and demand. In times of peace the police powers residing in the State governments are sufficiently exercised by keeping competition free and open and by such inspection laws as may be necessary to protect the public. But the business of dealing in necessaries so vitally affects the whole public that, when occasion arises, it is within the power of the State governments to make such regulations as may be necessary to limit the charges and profits exacted to such as are fair and reasonable. And when, as an incident to the prosecution of a war, it becomes necessary the Federal Government may exert the same power. In support of these general propositions, the authorities cited at pages 18–33 of the Government's brief in *United States* v. *L. Cohen Grocery Company*, No. 324, are referred to.

Exercising this power, Congress by the act of October 22, 1919, has endeavored to regulate, within reasonable bounds, all charges made by those who handle or deal in necessaries. The obvious theory of the law is that those who engage in the production and distribution of necessaries are em-

ploying themselves and their capital in rendering the service which is necessary to bring such articles to the consumer. The prosecution of a war requires that all the resources of the Nation shall be conserved and utilized. The Government itself must have immense quantities of the things necessary for the subsistence of its armies. That portion of the population not drawn into the armies must exist in order that the armies may be supported. Nothing can be of more vital importance, then, than that neither the Government nor the public shall be required, under the stress of war, to pay extortionate prices for those things necessary to sustain life. Even in time of war, those who render service to the public are entitled to receive fair and reasonable compensation for their labor and a fair and just return for the capital employed. But no man has either an inherent or a constitutional right to speculate upon the misfortunes of his country or to extort exorbitant charges for services rendered to the public under the stress of war conditions. Neither the right to contract nor the right to the use of one's property is unlimited. It is, for instance, one of the recognized functions of Government to protect the public from extortion by the enactment of usury laws. One's right to use his money is of just as high an order as his right to the use of any other property, and yet no one questions the right of Government to fix a rate of interest in excess of which he may not lawfully charge. Upon the same principle, when necessary for the protection of the Nation and the public, he may be prohibited

from deriving an exorbitant profit from so much of his money as he chooses to use in dealing in the necessaries of life.

Of course, it is recognized that conditions will inevitably exist during a war which will make it impossible to produce commodities or transport or handle them at prices which have been fair and reasonable in times of peace. But this act does not prohibit remunerative charges on the part of any person connected in any way with either the production or the distribution of necessaries. It merely enacts that these charges shall be reasonable, in view of existing conditions. To this end, it treats both capital and energy employed in the production and distribution of necessaries as employed in a business impressed with a public interest, and enacts, in effect, that the charges made for the use of both capital and labor in this business shall be fair and reasonable and not exorbitant or extortionate. The language of the act covers the whole field. To prevent injurious speculations and manipulations is recited as one of the purposes of the act, and it is made unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The charge made for the service rendered by himself or his capital by each successive handler of a commodity goes to make up the price which the ultimate consumer pays. The price which any handler, as the wholesaler, charges for the commodity when it goes to the next handler is the charge which he makes for the service rendered by him and his capital

added to the price which he paid to the previous handler. To determine, therefore, what charge any particular handler has made for the service rendered by him and his capital in handling or dealing in the commodity, there must be deducted from the price which he receives the price which he paid. The difference is the charge he has made for handling or dealing in the commodity. The act, therefore, is most comprehensive and condemns any unreasonable charge which is included in the price at which necessaries are sold. If, during a war, a dealer must pay more for the goods which he buys and for the labor he employs, and must thus use a larger capital to conduct his business, he will, of course, be entitled to make a larger charge for the service rendered by this larger capital and higher-priced labor. To be reasonable, however, his charges must be the same that would have been reasonable in time of peace, plus what is a reasonable compensation for the increased cost of conducting his business. The prices prevailing in time of peace, under free and open competition, may be assumed to be the standard of reasonableness. The usual corrective effect of competition, however, is much diminished under war conditions. The sudden withdrawal of so large a part of the labor of the country from productive operations and the simultaneous increase in the demand for necessaries to support the Army unsettles conditions which are ordinarily controlled by the law of supply and demand. The Government, then, may very well

protect itself and the public against this loss of competition and this temporary insufficiency of the law of supply and demand by requiring that, for producing and distributing necessaries, the charges shall be such as were usual and reasonable in peace times plus the amount necessary to cover increased cost and expense. In other words, the test shall be not how much is it possible to extort under the stress of war conditions, but how much, under existing conditions, will be reasonable compensation for the service rendered.

III.

Nature of the evidence upon which a jury must determine whether the prices at which necessaries are sold include an unreasonable charge.

The determination of what are reasonable charges in particular lines of business is not free from difficulties. But if we bear in mind, as suggested above, that what a dealer may add to the price which he has paid for his goods is such an amount as will be fair compensation for the use of the capital and labor which he has employed in handling the goods, it is entirely practicable—at least in most instances—to arrive at a safe conclusion. In determining what is negligence, juries are told that they must be governed by what is usually done by men of ordinary prudence under similar circumstances. What, in ordinary times, therefore, is a reasonable amount for a wholesaler to add to the price which he has paid for a given commodity can very readily be determined by show-

ing what has been usual and customary in that regard by merchants dealing in that commodity. If, then, it is shown that under war conditions it has been necessary for him to invest twice as much in the commodity and in the labor employed to handle it, this will be a guide to determining how much he may reasonably add to what was formerly a reasonable charge. Again, if under war conditions and war legislation, any rule for regulating such charges has been established by constituted authority and observed by dealers generally, this will furnish a safe standard for measuring charges subject to such changes as have been brought about by changing conditions. Again, if on account of the nature of a particular commodity and the ease with which it is disposed of, it has been customary in times of peace for dealers to charge a smaller profit than they charge on other commodities handled by them, it may safely be concluded that this difference should exist in times of war. If it is shown that, with respect to a particular commodity, actual experience has demonstrated that the expense of handling it, in connection with other commodities dealt in, is covered by adding to the cost price a certain per cent, this will furnish a guide to determining how much additional profit should be allowed as compensation for the capital employed. From some or all of the comparisons thus suggested a jury can usually reach a fair conclusion with reasonable certainty.

IV.

The task of determining what is a reasonable charge in the case of sugar is beset by as few difficulties perhaps as in the case of any other necessary article.

It happens that the long-continued practice of wholesale grocers in dealing with sugar and the practice of the Government during the early stages of the war in regulating such dealing makes it comparatively easy to determine what in April, 1920, was a reasonable charge for handling or dealing in sugar.

As shown above, sugar has been dealt in for many years by wholesale merchants on a very different basis from other and less staple articles. The proof, by witnesses on both sides, is that sugar has always been handled by such merchants on a very small margin, on a margin, indeed, too small to yield a profit if the merchant dealt in no other commodities. In other words, the demand for sugar is so constant, and the fluctuations in price so small, that, in the merchant's arrangement of his business, it is expected to bear a much smaller share of overhead expenses than other articles bear.

It is also true that during the early stages of the war the President, through agencies authorized by Congress, gave special attention to regulating the distribution of sugar. For this purpose, he acquired control of the supply of raw sugar and delivered it to the refiners at a given price, and then fixed the price which the refiner should charge the wholesaler as well as the price which the whole-

saler should charge the retailer and the retailer the consumer. Under the licensing system he was authorized to fix these prices and it was provided that the prices so fixed should be prima facie evidence in any proceeding brought in any court.

Whatever difficulties, therefore, may be encountered in arriving at reasonable charges for dealing in other commodities, it ought not to be difficult to reach a conclusion in the case of sugar.

V.

The evidence in this case abundantly supports the conclusion that the price of twenty cents per pound charged for sugar in each of the instances mentioned in the indictment included an unreasonable charge for handling or dealing in sugar.

The indictment charges that the sugar in question was purchased from the refiner at the price of 16 cents per pound and that the freight paid was 26.9 cents per 100 pounds, making the price 16.269 cents per pound, and that it was sold at 20 cents per pound, thus including a charge for handling or dealing in it, of 3.731 cents per pound, and that this was an unjust and unreasonable charge. The indictment avers also that $17\frac{3}{4}$ cents per pound was a just and reasonable charge and that any charge in excess of that was unjust and unreasonable. This, however, would seem to be surplusage. The averment that 20 cents was an unreasonable charge is the gist of the accusation and was sufficient. In other words, it is not necessary, in order to sustain this conviction, to establish that $17\frac{3}{4}$ cents was the limit of reasonable

charges. If the evidence establishes that anything less than 20 cents would be unreasonable, the offense denounced by the law has been committed. If it should appear that as much as 18 cents might have been charged without making the charge unreasonable, a sale at 20 cents would still be unlawful and the plaintiff in error would have committed the offense of which it is accused, although the Government may not have shown that it would be unreasonable to charge more than 17¾ cents, as averred in the indictment. The evidence does, in fact, support the claim than more than 17¾ cents was unreasonable. But I shall content myself with the effort to demonstrate that there can be no doubt that a charge of 20 cents was unreasonable, since that is all that is required to support the conviction.

The evidence referred to above shows that before the war wholesale merchants dealt in sugar on a very narrow margin. It was a staple which sold readily, with little expense, and was handled generally as a matter of advertisement and accommodation to customers. There was but little fluctuation in the price, which was from 4½ to 5 cents a pound. The wholesaler, according to one witness, usually added to the invoice price and freight from 35 cents to $1 per barrel of 350 pounds. This was a charge of from 10 cents to 28⅔ cents per 100 pounds for handling or dealing in the sugar. According to another witness quoted above the charge was about one-quarter of a cent per pound, or from 25 to 50 cents per 100 pounds, the difference being made

according to the standing of the customer and according to whether the sale was for cash or on credit.

When the Government acquired control of the raw sugars and fixed the charges of the various classes of dealers, it evidently took into consideration all the changed conditions. Instead of getting his sugar at from 4½ to 5 cents a pound, the wholesaler paid between 8 and 9 cents. Having to invest more money in the purchase of sugar, it was reasonable, of course, that, on that account alone, his margin of profit per pound should be larger. It was, in fact, fixed at 65 cents per 100 pounds, or $2.275 per barrel. Since sugar was scarce and it was almost impossible to supply the demand, the turnover was very rapid, and hence the money used in buying a particular lot of sugar was invested but a short time. However, the price of labor necessary to handle it had increased largely. At any rate, the charges customary before the war were more than doubled by the Government regulation. Indeed, the wholesaler was allowed to charge per 100 pounds about the average amount which he had previously been accustomed to charge per barrel. Before the war the reasonable charge for handling sugar, established by the custom of the merchants themselves, was one-quarter to one-third of a cent per pound on sugar costing from 4½ to 5 cents per pound. In view of this, there can scarcely be a doubt that the charge of 65 cents per 100 pounds, or about two-thirds of a cent per pound fixed by the Government on sugar costing from 8 to 9 cents per pound under war

conditions was fair and reasonable. This continued to be the prevailing charge until the time came when the Government no longer controlled the supply of raw sugars. The result was that there was no fixed price at which the wholesaler could get his sugar. The difference in cost at the various sources of production was such that no price for all sugars could be absolutely fixed. It followed that, in the fall of 1919, the prices at which wholesalers bought increased, so that when the sugar in this case was purchased by the plaintiff in error it cost 16 cents plus freight. In the meantime, however, the Government had again recognized that more money was required to handle sugar, and perhaps that conditions had changed in other respects, and the wholesaler's charge had been increased to 1 cent per pound, or $1 per 100 pounds. Formerly, sugar costing from 8 to 9 cents had borne a wholesaler's charge of 65 cents per 100 pounds. When the wholesaler had to deal in sugar costing 16 cents, he was allowed to charge as much as $1 per 100 pounds. This, of course, took care of much more than the interest or return upon the increased amount of capital. If the first charge was reasonable, the increase allowed was liberal. This $1 added to the cost and freight would have made the price to the retailer less than 17½ cents. As stated above, however, it is not at all necessary to show that the price of 17¾ cents mentioned in the indictment was the limit of reasonable charges. The plaintiff in error charged 20 cents, making a

margin between cost and freight and selling price of 3.73 cents per pound.

It is established that, under prewar conditions, in view of the manner in which sugar has always been handled, from one-third to one-fourth of a cent per pound was a reasonable charge on sugar costing from 4½ to 5 cents per pound, and that under war conditions, with sugar costing between 8 and 9 cents per pound, 65 cents per 100 pounds was reasonable. Between these figures and nearly 3¾ cents per pound there is a wide margin. There is, in fact, no effort in the testimony to justify any such increase. True, the cost of labor had enhanced, but we have here more than a tenfold increase in the charges made by the wholesaler, and there is no claim that there had been any such increase in the cost of labor or in anything else that went into the handling of sugar.

The conclusion that the price at which this sugar was sold included an unreasonable charge for handling or dealing in it is further verified by reference to the testimony as to the experience of the Creasy stores. The manner of doing business by these stores gives a good line on what experience has shown the actual cost of handling goods of this kind to be. These stores were conducted on something of a cooperative plan. The capital employed was furnished by the customers. Each customer deposited with the store $300. With the aggregate of these deposits as its capital, the business was conducted. No interest or dividend was to be paid to the depositor.

They were to get their returns on the money deposited in the form of decreased prices of the goods they bought. The plan was that the goods handled should be sold at a price over and above cost and freight sufficient to pay all the expenses of conducting the business, including one-half of 1 per cent of all sales to be paid to the general manager of all the stores. The business was conducted just as any other wholesale grocery, except that no traveling salesmen were employed. The amounts paid to the general manager of all the stores would correspond to and include at least a large part of the usual overhead incident to conducting a grocery business. The remainder of this overhead was taken care of out of the profits of the business. The whole scheme was based on charging, over and above cost and freight, such a percentage as would carry the business. The evidence is that these stores followed the customary plan of wholesale grocers of handling sugar and flour, and perhaps a few other staples, on a different basis from other commodities. Thus, the general plan was to add to the cost and freight 3 per cent. Of this, one-half of 1 per cent went to the general manager for his services and the other $2\frac{1}{2}$ per cent took care of the remaining expenses of conducting the business. In the case of sugar and flour, however, in line with the way these staples were handled by other wholesalers, a lower margin was adopted—only 1 per cent was added to the cost and freight and one-half of this went to the general manager. These stores have been conducted for a number of years and have al-

ways paid expenses on this basis. Since the charge for handling goods is put on a percentage basis, the plan works equally well when prices are low or when they are high. If the price of a given commodity doubles, and the cost of handling it also increases, there is no trouble, because with the price doubled the amount added as 3 per cent or 1 per cent is also doubled. It is true, of course, that a number of stores conducted under one general manager and upon this plan may, and doubtless do, keep their expenses somewhat below the expenses of the ordinary wholesaler, but the experience of these stores, at least, throws light on what charge is necessary to meet the expenses of conducting a business. Under this plan, 3 per cent on commodities in general and 1 per cent on sugar has been found to be sufficient both in peace times and during war.

In this case, 100 pounds of sugar, including freight, cost $16.29. The Government contends that a charge of 1 cent a pound, making the selling price $17.29, would be reasonable. The charge thus added would be a fraction over 6 per cent. Certainly, if the Creasy stores can be made to pay expenses by adding 1 per cent, there can be but little doubt that 6 per cent will provide for expenses and leave a reasonable profit. What the plaintiff in error actually did, however, was in selling 100 pounds of sugar to charge $20 instead of $17.29, as the Government insists it should have done, and this, added as its charge for handling or dealing in the sugar, is about 23 per cent.

Certainly, the evidence in this case amply supports the conviction, unless the plaintiff in error can sustain its contention that it is entitled to add its charge for handling, not to the cost of the sugar, but to its market value at the time of the sale.

VI.

The rate or charge made for handling or dealing in commodities is the excess of the selling price over cost and freight and not over market value at time of sale or replacement value.

It does not seem to be seriously insisted that a charge of nearly 3¾ cents per pound by a wholesaler for handling or dealing in sugar is either a reasonable charge or in accord with what has always been recognized as fair and just. The real contention seems to be that, although the charge allowed by the Government is a reasonable charge, the basis upon which this must be calculated to support the conviction in this case is erroneous. There is evidence to the effect that between the time this sugar was bought and sold the price of sugar had advanced to such an extent, that, in order to replace it in stock, the plaintiff in error would have been compelled to pay more than 20 cents per pound. It is therefore insisted that the reasonable rate or charge might properly be added to the market value of sugar at the time of the sale—that is, the amount which it would then have cost the wholesaler to buy an equal quantity.

It is said that this course is always followed by wholesalers in fixing the price at which they sell,

and that this is necessary, for the reason that the prices of various commodities fluctuate in the markets; that if the price of a commodity goes down after the wholesaler buys, he is forced by competition to meet the market and thus sustain a loss; and that to equalize this in the course of his business he must take advantage of a corresponding rise in commodities when he sells the latter. A number of witnesses were introduced to prove that in prewar times wholesalers dealt with sugar in this way. (Rec., pp. 41–65.) An examination of this testimony, however, discloses that, for several reasons, this cut very little figure in the profits which wholesalers made on sugar. In the first place, it was a staple article, the demand for which was steady. The result was that it was not long kept in stock, but was rapidly turned over. The fluctuations in the market were very slight, rarely being more than 10 points between the time of purchase and sale by the wholesaler. It does appear that there was a somewhat general effort among grocers to get the advantage of any increase in market price when they could. This increase, however, was always small, on account of the slight fluctuations and quick sales, and besides the testimony shows that, for practical reasons, it frequently could not be obtained. A particular grocer buying at an advanced price had to sell in competition with other grocers, some at least of whom had in stock sugar purchased at the lower prices and continued to sell on the basis of those prices. In order to keep his trade satisfied the

wholesaler had to sell as cheap as his competitor, and hence frequently could not afford to take advantage of the market. Under these conditions the witnesses all agree that in normal times wholesale grocers dealing in sugar never had occasion to apply the so-called rule to such conditions as existed in the latter part of 1919 and the early part of 1920, when it is said that prices advanced until they reached about 28 cents per pound. It can scarcely be said, therefore, that there was any established custom or rule among grocers that would apply to such conditions. Some of the witnesses themselves recognize this and shy at claiming that it would be fair or reasonable to take advantage of such great advances in the market price. Thus, one witness says:

> A dealer can naturally take into consideration all circumstances surrounding the sale he is making. If the profit he is going to make would be exorbitant profit, an unreasonable profit, he would not take advantage of it. (Rec., p. 42.)

And another, confronted with the actual claim made in this case, said:

> If I bought at sixteen cents and had that sugar in town, and the next lot was going to cost me twenty-eight, I would not expect to get twenty-nine or thirty. I don't know that we would get an unreasonable price, you think, twenty-nine, might be unreasonable—probably would be. According to the rule laid down a while ago, I ought to get all I could, but we take into consideration the condition

> of the times, we can't go to the trade and demand the price. That would be out of reason. We haven't had that condition to contend with and I couldn't tell you whether we would or not. That condition never came up so far as fifteen-cent sugar jumping to thirty cents. (Rec., p. 53.)

In other words, the witnesses themselves practically admit that the custom prevailing in normal times, when fluctuations in the market were slight, if followed under such conditions as existed when the sales in this case were made, would result in such unreasonable profits that the honest grocer's conscience would not permit him to take them. This emphasizes the necessity for just such a law as is involved here. If, without the restraining hand of the law, it was possible for the dishonest or avaricious grocer to make charges which the honest grocer would not make, the need of legislation was imperative. The necessity of legislation arose from the scarcity of sugar. In ordinary times, open and free competition will regulate the market, and in the case of a staple like sugar there will be but little fluctuation. Under such conditions, if a particular grocer, having bought sugar which has since advanced in price, chooses to withhold it from the market until his competitors have sold the low-price sugar they have in stock and thus sell his own on the basis of the new market, there can be but little detriment to the public. But the object of this legislation, on account of the scarcity of sugar, was not only to regulate

prices but to promote the prompt distribution of sugar. The act itself contains stringent provisions against hoarding. To prevent speculation is one of the declared objects of the act. The business, therefore, with which Congress was dealing was a business in which it was expected and intended that sugar should be bought and immediately sold. The purposes of the act would have been as much frustrated by encouraging wholesalers to hold their sugar in order to reap expected profits from an advancing market as by permitting them to make exorbitant charges. Both purposes were accomplished by treating the wholesaler and his capital as rendering a service to the public in distributing necessaries and providing that, for that service to the public, only reasonable and just compensation should be demanded. Both purposes would be frustrated if it was within the power of the dealer, by withholding from the market his sugar, to reap a large profit from a rapidly advancing market in addition to the reasonable and just compensation for handling or dealing in sugar.

Moreover, the contention that the wholesaler's charge should be based upon replacement values and not upon cost involves a contradiction in terms. The difference between what a merchant pays for his goods and what he sells them for is, in fact, what he receives for handling or dealing in them, whether we call it his gross profit or the charge which he makes for handling or dealing. To illustrate by the present case: The plaintiff in error bought sugar which cost

him 16.29 cents per pound. Seven or eight days later he sold it for 20 cents per pound. The difference was received by him as a result of handling or dealing in this sugar. It is wholly immaterial whether it is called a gross profit, compensation for his capital and labor, or a charge which he has made for buying, handling, and selling.

No one will deny that a merchant who, on account of trade conditions, has found himself unable to dispose promptly of his stock, and has thus been compelled to carry for a long time his goods, may fairly sell them, if market conditions subsequently enable him to do so, at something in advance of what would have been a fair price at the time he bought them. This is because he is entitled to some compensation, if he can get it, for the capital that has been invested and the expense of keeping his goods on hand. But in the case of goods which are bought and then sold in a few days, no such consideration enters into the matter. Nothing is so vital to the prosecution of a war or to keep the country in a condition, during the period of an armistice, to resume hostilities, if necessary, as the production and fair distribution of those things which are necessary to sustain life. There is no more striking example of a business impressed with a public interest than the business of handling or dealing in necessaries during such time. If the Government can not properly treat both the capital and the labor employed in conducting this business as subject to regulation and may not deny to both the right to exact exorbitant charges for the service ren-

dered, it is, indeed, powerless. The corrective effect of competition has been greatly diminished by the necessity which forced the Government, in order to raise armies, to withdraw millions of men from productive fields of labor. This made it necessary and proper that the Government should protect itself and the public from this loss of competition. It could do this no more effectively than by saying that labor and capital engaged in distributing necessaries should receive only just and reasonable compensation.

It is argued that when a merchant buys goods, and the market value of those goods enhances while he holds them, the increased value becomes his property and that the Government can not take this away from him by requiring him to sell at a price below what it would cost him to replace the goods. But profits arising from enhancement in values are mere paper profits and do not actually accrue to the owner of the property until realized by sale. This is constantly recognized in determining what is income for the purpose of taxation. This war measure which we are considering is directed at those who make a business of buying and selling necessaries. It does not compel any man to enter that business. It applies only to those who voluntarily buy for the purpose of selling. It does not compel anyone to part with anything he buys without a fair and reasonable compensation. It simply says to the merchant who buys necessaries for the purpose of selling them that in the charge which you make for handling and dealing in these necessaries you

shall not include more than a reasonable profit. It simply regulates the use which may be made of property consisting of necessaries purchased for the purpose of being sold. The Government only does to these dealers what every State Government in the Union does, even in times of peace, to every man who owns money by saying to him, if you loan this money you shall only charge a given rate of interest.

It is said that the Act of preventing the wholesale dealer from realizing a profit arising from advances in the market is a taking of his property for a public use without compensation. The answer to this is, that this statute does not in any sense, take property. It merely regulates the use of property. It is an exercise by the Federal Government, for the purposes of the war, of police power, and the constitutional prohibition against taking property without compensation has no relation whatever to the lawful exercise of the police powers of Government. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

VII.

Objections to rulings of the court admitting and excluding evidence.

One objection is made to the action of the court in admitting evidence, and one because of the exclusion of other evidence.

Over the objection of the plaintiff in error the Government was permitted to prove by the fair-price

commissioner how the prices fixed by the Government as fair and reasonable had been arrived at. This witness, an experienced wholesale grocer, testified, independently of the action of the fair-price committee, to facts tending to show that the prices fixed were fair and reasonable. He also detailed the proceedings of the fair-price committee showing what was considered and that the committee was controlled by the considerations stated by him as the reasons for his own conclusions that the prices fixed were reasonable. Objection was made to his testimony so far as it related to the action of the fair-price committee. As shown in the foregoing statement of the case, the court admitted the evidence but stated at the time, in effect, that it would go to the jury not as establishing the reasonableness of the prices fixed, but to be considered by them in connection with all the other evidence. This was certainly as favorable a ruling as could have been asked. The act authorized the President to make all regulations necessary for its proper enforcement, and specifically provided that he should have the power to fix reasonable prices, which should be prima facie evidence in any proceeding in court. Moreover, the testimony of the witness was but the detailing of matters which he had previously considered as an official and upon which the testimony which he was then giving as a witness was based. This testimony was clearly admissible, particularly in view of the instructions subsequently given to the jury as to its weight and effect.

On the other hand, the plaintiff in error offered to prove that some agent of the Department of Justice had, in August, 1919, written letters to wholesale merchants in Texas, in which he told them that replacement values should be used in fixing prices. It is not shown that this statement was authorized by the President or by the Attorney General; that at the time the sales in this case were made the plaintiff in error had ever heard of them, or that it was in any way misled by them. It is difficult to perceive upon what principle this evidence could have been admitted, and the court was clearly right in excluding it.

VIII.

Objections to the charge.

There was an objection to that part of the charge quoted hereinbefore referring to the fixing of prices by the President through the agency of the Attorney General and the fair-price commission at Atlanta. After referring to the fact that evidence had been introduced as to what these agencies of the President had determined to be a fair and just rate in handling or dealing in sugar at wholesale, the court said:

> That evidence has been admitted before you for what you think it is worth. It is not conclusive; it is not a judgment; the Oglesby Grocery Company was never called before either one to have a hearing about it so that a trial could be had to fix the thing. It is admitted only as prima facie evidence as to what the Attorney General and the fair-price commission decided was just and reasonable. (Rec., p. 76.)

From what has been said above it is plain that the court would not have been in error if the jury had been instructed that the prices fixed were to be treated as prima facie reasonable and just. The court, however, did not go that far. The utmost weight that could be given to the evidence under his instruction was to treat it as "prima facie evidence" *as to what the Attorney General and the fair-price commission decided was just and reasonable.* That this action in fixing prices was a circumstance that could be looked to can scarcely be doubted. Under the instruction given this was all the weight it was permitted to have with the jury. The instruction complained of was, in fact, more favorable to the plaintiff in error than it was entitled to.

Numerous objections are made based on the refusal of the trial judge to instruct the jury that replacement value and not cost should be used as the basis for fixing reasonable charges. The instruction to the contrary actually given is also complained of. The Government's answer to these criticisms of the trial judge is found in the argument just made upon the contention that replacement values and not cost should be used to determine what is a reasonable rate or charge. If that argument is sound, the instructions given by the judge were correct.

The other objections to the charge raise in various forms the question of the constitutionality of the act in question. These contentions have been fully met by the Government's argument in the briefs in other

cases now pending before the court and referred to and adopted in the beginning of this brief. They are also most admirably met and answered in the opinion of District Judge Sibley in this case, found in the record at pages 4–8.

CONCLUSION.

It is respectfully submitted that there is no error in the judgment of the court below and it should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

OCTOBER, 1920.

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